

KARAHODZIC (Migration) [2019] AATA 3969 (26 August 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs HADZIJA KARAHODZIC
Ms Jasmina KARAHODZIC
Mr Emin KARAHODZIC
Mr Sanel KARAHODZIC

CASE NUMBER: 1717393

HOME AFFAIRS REFERENCE(S): 2014115632

MEMBER: Russell Matheson

DATE: 26 August 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decisions not to grant the applicants Partner (Temporary) (Class UK) visas.

Statement made on 26 August 2019 at 8:19am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – non-appearance before the Tribunal – application dismissed – representative’s mistake – application reinstated – relationship ceased – family violence claim – existence of genuine spousal relationship – nature of the household – living separately and apart on a permanent basis – lack of mutual commitment – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 360, 362B

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.321

CASES

He v MIBP [2017] FCAFC 206

Pokharel v Minister for Immigration and Border Protection (2016) FCAFC 34

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named applicant (the applicant) is a 46-year-old female born in Bosnia who is an American citizen. She applied for the visa on 21 August 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) of Schedule 2 to the Regulations because the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsor. The applicant seeks review of the delegate's decision.
5. The applicants were invited under s.360 of the Act to appear before the Tribunal on 5 June 2019 at 10 am, but did not do so. The Tribunal dismissed the application under s.362B(1A) (b) of the Act and the review applicants applied for reinstatement of the application within the prescribed period. The applicant's migration agent failed to inform the applicant of the time and date the review hearing was being held due to illness and a family death. For these reasons, the Tribunal considered it appropriate to reinstate the application.
6. The applicant appeared before the Tribunal on 20 June 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's three children. The Tribunal hearing was conducted with the assistance of an interpreter in the Bosnian and English languages.
7. The applicants were represented in relation to the review by their registered migration agent.
8. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

9. BACKGROUND

10. Department of Immigration (the Department) records indicate the applicant's immigration history is as follows:
11. On 4 April 2014, the applicant first arrived in Australia as the holder of an Electronic Travel Authority (ETA) (subclass 601) visa.
12. On 21 May 2014, the applicant departed Australia as the holder of an ETA (subclass 601) visa.
13. On 24 May 2014, the applicant arrived in Australia as the holder of an ETA (subclass 601) visa.
14. On 21 August 2014, the applicant lodged a Partner (subclass 820/801) visa application and were subsequently granted a Bridging A (subclass 010) visa

15. The applicant is the current holder of a Bridging A (subclass 010) visa.
16. On 3 August 2015, the applicant was sent a letter inviting her and her sponsor to attend an interview and bring any further evidence to support the parties' relationship claims. The interview was scheduled for 12 August 2015. The applicant was asked to contact her case officer in advance if she was unable to attend. The letter stated that if the applicant failed to attend the interview without an acceptable reason, a decision may be taken without interviewing her. The applicant and her sponsor did not attend the interview. On 12 August 2015 the applicant advised that she was changing her migration agent.
17. On 12 August 2015, the applicant was provided with procedural fairness and requested to provide evidence of her relationship with her sponsor. On 31 October 2016 a Departmental officer attempted to call the applicant and her sponsor, however there was no answer. On 31 October 2016 the applicant was given another opportunity to provide evidence of her relationship with her sponsor by way of a second letter.
18. On 2 November 2016 a phone call was made to the applicant to follow up on the outstanding documents. During this phone the applicant advised that she had moved to a new address because her sponsor had left her some time ago and she did not know his whereabouts.
19. On 2 November 2016, the applicant was provided with procedural fairness and a letter containing information concerning the criteria that must be met to continue with the application. The applicant was asked to provide certain documentation if she wished to proceed with her application despite the relationship breakdown. The applicant was asked to contact the Department if her relationship resumed. She was also given the opportunity to withdraw her application.
20. On 20 November 2016 the applicant appointed a new migration agent, Mr Mohammad Sharif Amin. On 2 December 2016 an email was sent to her new migration agent to follow up on a response for the letter sent to the applicant on 2 November 2016.
21. On 2 December 2016, the Department received an email from the applicant's migration agent submitting that the applicants relationship had broken down and that she and her daughter had suffered family violence committed by the sponsor.
22. Prior to considering the claims of family violence, the Tribunal must first assess whether the applicant had been in a genuine and continuing relationship with the sponsoring partner prior to the cessation of her relationship. The Tribunal must be satisfied that the applicant was the spouse of the sponsoring partner at the time of application, and that the relationship would have continued if the claims of family violence had not occurred.
23. Because the applicant had provided limited evidence of a genuine and continuing relationship with her sponsor, on 5 December 2016 the Department wrote to the applicant requesting her to provide evidence of her relationship with the sponsor.
24. The applicant provided documents as evidence to the Department to demonstrate that she was the spouse of the sponsor, including:
 - Marriage certificate;
 - Two Form 888 statutory declarations;
 - Photographs;
 - Joint bank statement;

- One page of a joint residential tenancy agreement; and
- One letter addressed to the applicant.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
26. The Tribunal has before it the applicant's file from the Department; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.

27. Hearing

28. At the review hearing, the Tribunal asked the applicant if her relationship had ceased with the sponsor. She confirmed in oral evidence that the relationship had concluded. The Tribunal furthermore notes in the decision record supplied by the applicant that the applicant's agent had informed the Department by an email on 2 December 2016 that the applicant's relationship with the sponsor had broken down and that she and her daughter had suffered family violence committed by the sponsor.
29. The Tribunal, on the evidence before it, including that in the decision record supplied by the applicant, is of the opinion that at the time of decision the relationship between the applicant and sponsor has ceased. Therefore applicant cannot meet cl.820.221(1)(a).
30. The Tribunal invited the applicant to make any claims to any of the exceptions to be granted the visa after the relationship with the sponsor had ceased. The applicant said as far as she was aware the sponsor was still living and she did not know his whereabouts, so she did not claim the exception for the sponsor's death. The applicant said there were no children of the relationship so there was no claim in relation to the exceptions involving the care of and responsibility for children.
31. The Tribunal asked the applicant if she wished to claim the family violence exception. The applicant made a claim of family violence perpetrated by the sponsor upon herself. The Tribunal explained to the applicant the process of how a family violence claim worked in a Partner visa application and that it would consider whether the applicant had been in a genuine and continuing relationship with the sponsoring partner prior to the cessation of the relationship. The Tribunal must be satisfied that the applicant was the spousal partner of the sponsoring partner at the time of application, and that the relationship would have continued if the claims of family violence had not occurred.

Whether the parties are in a spouse or de facto relationship

32. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
33. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

34. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Merrylands, New South Wales, on 19 July 2014. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
35. In forming an opinion as to whether they are in a married relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together, or not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
36. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
37. The Tribunal had the benefit of the applicant's and three witnesses' oral evidence at the hearing. The Tribunal gave all the evidence provided by the parties and witnesses at the Tribunal hearing and evidence provided by the applicant to the Department in the primary application and Tribunal file due regard. The three witnesses provided little evidence in regard to the parties being in a genuine relationship or any evidence of family violence occurring, and the Tribunal found their evidence to be inconsistent and lacked detail.
38. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant in the course of the hearing.

Are the other requirements for a spouse relationship met?

39. Financial aspects

40. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
41. The applicant has provided one joint bank account statement dated 25 April 2015 to 24 June 2015. Given this statement has limited transactions(four),- a one hundred dollar deposit, three debits totalling \$90.74 - and a balance of \$9.26, the Tribunal gives it no weight in demonstrating that the applicant and sponsor pooled their finances or that they used this account for everyday living expenses or joint savings. The applicant gave evidence that she

used to deposit her wages into the joint account. The applicant did not produce any documentary evidence that demonstrated that this had occurred.

42. The applicant did not provide any additional documentary evidence to the Tribunal in relation to the financial aspects of her relationship with the sponsor that she had not already provided with her visa application.
43. There is no evidence before the Tribunal that the parties have any joint ownership of real estate, major assets, joint liabilities or that any one person in the relationship owes any legal obligation in respect of the other. The applicant has provided limited information regarding the financial aspects of the parties' relationship in relation to any pooling and sharing of financial resources or sharing of daily living expenses. Based on the evidence provided, the Tribunal finds that the financial aspects of the relationship are not indicative of the parties being in a genuine spousal relationship. The Tribunal places no weight on this aspect of the relationship.

44. *Nature of the household*

45. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together or not living separately and apart on a permanent basis.
46. The applicant gave evidence that she lived with the sponsor at Fairfield from October 2014 with her children. She further stated that they lived at Fairfield for a period of four to five months before moving to Auburn in February 2015. The applicant provided the first page of a joint residential tenancy agreement for the period 25 October 2014 to 24 October 2015 for the Fairfield address and a single letter addressed to the applicant. The Tribunal is of the view the lease agreement itself or a single letter addressed to the applicant is not sufficient evidence to demonstrate that the parties jointly managed a household and lived together as spouses. The Tribunal asked the applicant to describe her living arrangement with the sponsor at the Fairfield address. The applicant told the Tribunal that the sponsor would spend the week with her and return to his housing commission home on weekends in Toukley NSW. The Tribunal then questioned the applicant's three children in regard to the living arrangements between the parties. The applicant's daughter J stated that the sponsor lived with them for three months at Fairfield after her mother married the sponsor. She further stated that she could not remember the exact dates. The applicant's son E stated that the sponsor stayed at Fairfield for a couple months coming and going and stopped coming in October 2014. The applicant's daughter S told the Tribunal the sponsor wasn't a nice person and that he stayed a few months at Fairfield towards the end of 2014 and that her mother visited the sponsor on weekends. The Tribunal found the applicant and her children's evidence to be inconsistent and lacked detail. The Tribunal places little weight on their evidence in regard to the parties establishing a household together.
47. The applicant told the Tribunal that she did all the housework because men from Bosnia don't do anything around the house. The applicant and her children (witnesses) all stated that the sponsor said he would look after them but provided no support at all.
48. The Tribunal finds, based on the evidence before it, there is little supportive evidence that indicates that the applicant and sponsor were in a genuine and continuing spousal relationship prior to cessation of the relationship. Based on the evidence provided, the Tribunal finds that the parties do not live together and are living separately and apart on a permanent basis and there was no sharing of the housework. There is no evidence of any joint responsibility for the care and support of children.

49. Social aspects

50. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
51. The applicant gave evidence to the Tribunal that the parties never dined out together or socialised with others because she was busy working. She further stated that they had some family barbeques together.
52. The applicant has provided photos to the Department with the visa application which appear to cover only a few occasions and most depict the parties in each other's company. There is no description of where and when the photos were taken. Therefore, the Tribunal places little weight on them in assessing the social aspects of their relationship. The Tribunal is unable to determine the nature of the relationship based on the photos provided. The applicant provided no additional photographs of the social aspects of her relationship with the sponsor.
53. The applicant also provided Form 888 Statutory Declarations from her parents with her visa application. Both declarants have not stated how long they have known the sponsor, and the reasons the declarants state they believe the relationship is genuine are not convincing and almost identical. The statements give no insight into the inception and development of the relationship. The Tribunal places no weight on the statements when assessing the social aspects of the relationship.
54. Overall, there is little convincing evidence that the applicant and sponsor have represented themselves to other people as being in a partner relationship with each other or to family or the wider community, or that they undertook regular joint social activities, travelled together or that they attended any significant events together.
55. Based on the information provided, the Tribunal finds there is little evidence that the applicant and sponsor represented themselves to family and friends as being married to each other, or are regarded by others as such. The Tribunal is not satisfied the social aspects of the relationship indicate that the parties were in a genuine and continuing relationship. The Tribunal places little weight on this aspect of the relationship.

56. Commitment

57. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
58. The applicant and sponsor claim in their personal statements to have first met on 11 May 2014 and married on 19 July 2014. The Tribunal accepts the parties were lawfully married as they have provided a marriage certificate. However, the applicant has not provided any convincing evidence of mutual obligation, companionship, emotional support and long term planning – typical elements of a genuine and continuing relationship. There is little evidence before the Tribunal that the parties' relationship lasted any longer than October 2014, a period of three months. The Tribunal accepts the parties may have lived together for a period of three months.
59. The applicant gave evidence during the hearing that the first time she had ever met the sponsor was on the day of their wedding which had been arranged by her parents. The Tribunal pointed out to the applicant that she had indicated in her personal statement

provided to the Department that she had met the sponsor on 11 May 2014. The applicant responded through her agent that she is not sure about the dates. The Tribunal found the applicant to be vague at times when giving evidence and found her evidence lacked detail and was inconsistent. The Tribunal accepts that she may have trouble remembering dates.

60. There is little evidence before the Tribunal that indicates that the applicant and sponsor have derived a degree of companionship and emotional support from each other during the short term of the relationship. Given the above-mentioned chronology of their relationship, the Tribunal finds the level of this support was at best, very minimal at the time of application.
61. Based on the evidence provided, the Tribunal finds the relationship between the applicant and sponsor was at a reasonably immature stage at the time of application and accordingly it considers their commitment to each other at that time to be commensurate and does not consider the parties regarded their relationship as a long-term one.
62. Therefore, the Tribunal is not satisfied that the nature of the parties' commitment to each other supports the existence of a genuine and continuing spousal relationship.
63. On the basis of the above, the Tribunal is not satisfied that the requirements of s.5F(2) of the Act are met at the time the visa application was made.
64. The Tribunal is not satisfied the applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that the relationship between them was genuine and continuing, at the time of the visa application. The Tribunal is therefore not satisfied that the requirements of s.5F(2) of the Act were met at the time of the visa application.

65. **Conclusion**

66. The Tribunal has considered all the evidence and information provided in relation to the matters prescribed under r.1.15A and considers that it is not sufficient to demonstrate that the applicant was at the time of application the spouse of the sponsor, as defined under s.5F of the Act.
67. The Tribunal acknowledges the applicant's claim of family violence committed by the sponsor. However, it has not taken the family violence claims into consideration because it is not satisfied that applicant and sponsor were in a genuine and continuing spousal relationship at the time of application: as per Federal Court Decision *Pokharel v Minister for Immigration and Border Protection* (2016) FCAFC 34.
68. Therefore, the Tribunal finds the applicant does not meet the requirements of cl.820.211(2) (a).
69. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
70. All secondary applicants were also considered against cl. 820.211, and it was found that they did not meet this criterion.
71. As none of the applicants included in this decision meets the requirements of cl.820.211, which is a primary criterion that must be satisfied at the time of application and continue to be satisfied at the time of decision, it necessarily follows that none of the applicants is able to meet the secondary criterion of cl.820.321 of Schedule 2 to the Regulations by virtue of being a dependant or a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a Partner (Temporary) (Class UK) (Subclass 820) visa.

DECISION

72. The Tribunal affirms the decisions not to grant the applicants Partner (Temporary) (Class UK) visas.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).